NO. 3833

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

WILLIAM R. CASTLE, LORRIN A. THURSTON, and ALFRED L. CASTLE, Trustees under the Will of JAMES BICKNELL CASTLE,
Plaintiffs-in-Error,
vs.
HAROLD K. L. CASTLE and the TERRITORY OF HAWAII,
Defendants-in-Error.

No. 3833.
In Error to the Supreme Court of Hawaii.

BRIEF OF THE PLAINTIFFS IN ERROR

Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

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This is an appeal from a judgment affirming an order fixing and determining a territorial succession tax of $19,655.86 with interest at 7% from October 8, 1918, on property passing by the will of James Bicknell Castle. (Record, p. 62.) The will created a trust on which was charged an annuity to a son of the testator, valued at $183,165.53 by the stipulation (the other annuities in the will are eliminated by rejection or death) and all surplus income to accumulate during and with the remainder at the expiration of said annuity to be devoted to an edu-

cational charity. The net estate was valued at $317,-244.11 and by the stipulation the remainder at $134,-078.68. (Record, p. 3.) The tax of $19,655.86 was not fixed by determining who the beneficiaries were, their relations to the testator, or the value of their legacies, but was levied on the executors and trustees on the net valuation of the estate as though there were one gift to a stranger. The court refused to exempt the charitable gift from a tax as provided by the territorial statute or to assess the annuity at its agreed valuation on the lesser rate provided by the territorial statute of 3 per cent. with an exemption of $5,000 when there is a gift to a son; but assessed it at the rate of 6½%. It is agreed that the tax on the son's gift would be $4,569.96 were he the successor and if the value of his gift to be deducted from the net estate the value of the remainder is $134,078.68 on which there would be a tax of $7,750.10 if taxable at all. (Record, p. 3.)

The material parts of statutes of the Territory of Hawaii in force on April 8, 1918, when the testator died, are as follows:

Act 223, Session Laws, Territory of Hawaii, 1917, amends Section 1325 of Chapter 95, R. L. of Hawaii, 1915, by providing that, "All property which shall pass by will * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or persons, or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax * * *"

"When the beneficial interest to any property or income therefrom shall pass to or for the use of his * * * child * * * the rate of the tax shall be * * * in excess of five thousand dollars * * * 3 per cent. on amounts between $100,000 and $250,000 * * *"

"When property passes as provided herein in trust or otherwise and the rights, interests or estates of the donee are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed * * * and such tax shall be due and payable forthwith by the executors or trustees *out of the property transferred.*"

Section 1324 of R. L., Territory of Hawaii, 1915, provides, "All property transferred to * * * any person, society, corporation, institutions or associations of persons in trust for or to be devoted to any charitable, benevolent, educational or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy to any such property, shall be exempt from this tax."

Section 1325, R. L., Territory of Hawaii, 1915, provides that, "When any grant, gift, legacy or succession upon which a tax is imposed by Section 1323 shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, and the market value thereof determined in the manner provided in Section 1334 and the tax * * * shall be immediately due and payable * * * provided that the person, persons, or body politic or corporate, beneficially interested in the property chargeable with said tax may elect not to pay the same until they shall come into the actual possession

or enjoyment of such property," and on such election shall give a bond for its payment.

Section 1329 provides that "Any administrator, executor or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom * * * if, however, such legacy be given in money to any person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the circuit judge, having jurisdiction, to make an apportionment, if the case require, of the sum to be paid into his hands by such legatees, and for such further order relative thereto as the case may require."

Section 1334 of R. L., Territory of Hawaii, 1915, provides that, "When the value of any inheritance, devise, bequest, or other interest subject to the payment of said tax is uncertain, the circuit judge before whom the probate proceedings are pending, on the application of any interested party, or upon his own motion, may appoint some competent person or persons as appraisers, as often as and whenever occasion may require, whose duty it shall be forthwith to give notice, by mail, to all persons known to have, or to claim an interest in such property, to the Treasurer of the Territory and to such persons as the circuit judge may by order direct, of the time and place at which he will appraise such property, and at such time and place to appraise the same and make a report thereof, in writing, to said circuit judge, together with such other facts in relation thereto as said circuit judge may by order require to be filed with the clerk of said court; and from this report, or in case appraisers are not appointed, in any event, the said circuit judge shall, by order assess and fix the value of all inheritances, devises, bequests, or other interests, and the tax to which the same is liable, and shall immediately cause notice thereof to be given by mail, to all persons known to

be interested therein. The value of every future or contingent or limited estate, income or interest shall, for the purpose of this chapter, be determined by the insurance commissioner, by the rule, method and the standards of mortality and of value that are set forth in the American Experience tables of mortality for ascertaining the value of policies of life insurance and annuities and for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per centum per annum, and said commissioner shall certify such value to the appraisers or judge as the case may be."

Act 223, Session Laws of Hawaii, 1917, is as follows:

SECTION 1. Section 1323 of chapter 95 of the Revised Laws of Hawaii, 1915, is hereby amended to read as follows:

"Section 1323. Imposed when, rate. All property which shall pass by will or by the intestate laws of this Territory, from any person who may die seized or possessed of the same while a resident of this Territory, or which, being within this Territory, shall pass, whether by the laws of this Territory or otherwise, from any person who may so die while not a resident of this Territory, or which or any interest in or income from which, shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectancy, to any property, or to the income thereof, shall be and is subject to a tax hereinafter provided for, to be paid to the treasurer of the Territory of Hawaii as hereinafter directed, for the use of the

Territory; and such tax shall be and remain a lien upon the property passed or transferred until paid, and all administrators, executors, and trustees of every estate so transferred and the person to whom the property passes or is transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemption hereinafter granted.

Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after April 28, 1909, such appointment when made, shall be deemed a transfer taxable under the provisions of this chapter in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this chapter shall be deemed to take place to the extent of such omissions or failures in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

When the beneficial interest to any property or income therefrom shall so pass to or for the use of his or her father, mother, husband, wife, child, grandchild, or any child adopted as such in conformity with the laws of the Territory of Hawaii, the rate of the tax shall be at the following percentage rate of the market value of such property, received by each person, except aliens and non-resi-

dents of the United States, in excess of five thousand dollars, viz:

1½ per cent. on amounts between $5,000 and $20,000.

2 per cent. on amounts between $20,000 and $50,000.

2½ per cent. on amounts between $50,000 and $100,000.

3 per cent. on amounts between $100,000 and $250,000.

3½ per cent. on amounts over $250,000.

In all other cases, except aliens and non-residents of the United States, the rate of tax of the market value of such property in excess of five hundred dollars shall be as follows, viz:

3 per cent. on amounts between $500 and $5,000.

5 per cent. on amounts between $5,000 and $20,000.

5½ per cent. on amounts between $20,000 and $50,000.

6 per cent. on amounts between $50,000 and $100,000.

6½ per cent. on amounts over $100,000.

When the beneficial interest to any property or income therefrom shall so pass to an alien or non-resident of the United States, the rate of tax shall be 10 per cent. of the market value of such property received by each person, in excess of five hundred dollars ($500). All property so passing for which such exemption of five thousand dollars ($5,000) can be maintained shall not be taxable as income under the provisions of any other law.

When property passes as provided herein in trust or otherwise, and the rights, interest or estates of the donees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of

this Act, and such tax so imposed shall be due and payable forthwith by the executors or trustees out of the property transferred."

SECTION 2. This Act shall take effect on July 1, A. D. 1917.

The assignments of error are as follows:

1. The court erred in affirming the decree in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated April 20, 1921, and ordering the payment of a tax in the sum of $19,655.86 by the Executors of the Estate of James Bicknell Castle as a transfer tax under the succession tax laws of the Territory of Hawaii;

2. That the court erred in affirming the taxing of that portion of the estate of James Bicknell Castle which was transferred to the trustees for charity and for educational purposes, such a gift being exempt from succession tax by the laws of the Territory of Hawaii;

3. That the court erred in affirming the exemption from a succession tax of an annuity to a son of James Bicknell Castle of an admitted value of $183,165.53;

4. That the court erred in affirming a tax on the property of the estate and not upon the right of succession of those taking under the will of James Bicknell Castle;

5. That the court erred in holding that no property passed by the will of James Bicknell Castle to his son, Harold K. L. Castle;

6. That the court erred in holding that in order to exempt charitable gifts from a succession tax all the estate of the testator must be given wholly to the charitable object.

7. That the court erred in holding that a tax in the sum of $19,655.86 was correctly levied when the admitted value of the legacies passing to the different legatees called at the most for a tax of $12,320.06;

8. That the court erred in holding that the entire tax should be taxed at a uniform rate as part of it passed to a son and part to trustees for charity;

9. That the court erred in holding that all questions raised on the writ of error had been decided on the former appeal.

ARGUMENT.

THE HAWAIIAN TAX IS ONE OF SUCCESSION.

It is too well established for argument that an inheritance tax such as this in the Territory of Hawaii is not a tax upon property but an excise tax upon the right to succeed to property.

Maxwell v. Bugbee, 250 U. S. 538.

Magoun v. Ill. Trust & Savings Bank, 170 *U. S.* 283.

Estate of Dillingham, 25 Haw. 129.

THE PERSON WHO SUCCEEDS TO PROPERTY IS THE ONE WHO GETS THE BENEFICIAL INTEREST.

The Hawaiian statutes plainly state this and all decisions of similar statutes from which the Hawaiian statute was drawn have so held.

The earliest case is *Sohier v. Eldridge,* 103 Mass. 345, in which the U. S. St. 1864, c. 173, inheritance tax law was construed. It was there contended that because there was a gift to trustees they were the successors, but the court held otherwise and said the tax was the same whether there was a gift directly to a person or to a trustee for that person's benefit.

U. S. v. Tappan, 16, 431, Fed. Cas., Choate, J., says of this same contention, "It is clear from all these provisions that the 'successor' is the party beneficially interested in real estate * * * There is nothing whatever, not a single expression in the act going to show that an executor or trustee, holding the title for such person so beneficially interested, or empowered to collect the rents and profits for such person is to be regarded as the 'successor'."

State v. Hale, 100 Minn. 192, 110 N. W. 865, in construing the Minnesota law, the court reversed an order levying a tax on the trustees as successors to the property when they held for certain life interests and contingent remainder.

In re Tracy, 179 N. Y. 501, the exact language of the Hawaiian statutes are construed and these words of Judge Haight are approved: "The tax is not required to be paid by the conditional transferee, but by the provision of the statute, it is 'to be paid out of the property transferred,' so that whoever may ultimately take the property takes that which remains after payment of the tax."

Re Est. Kennedy (Cal.) 29, L. R. A. (N. S.) 428.

Re State, 132 Iowa 140, "The collateral inheritance tax law is on the right of succession of property * * * and is collectable out of each specific share or interest, not out of the general property of the estate."

"If an estate in remainder is appraised simultaneously with an annuity or life interest its value is determined by deducting from the entire estate the value of the annuity or life estate." There was a gift to trustees, *Milton v. Burrill,* 229 Mass. 140, 118 N. E. 274.

Minot v. Winthrop, 162 Mass. 113-126, "The statute contemplated that the tax should be paid out of the annuity as soon as the annuity becomes payable and at the time when payments on account of the annuity are made."

After an extensive search of authorities we are unable to find a single decision of a court of last resort holding that trustees are successors to legacies under tax laws.

THE DECISION OF THE TERRITORIAL SUPREME COURT IS AMBIGUOUS.

The decision of the Supreme Court of the Territory on reserved questions in 25 Haw. 108 says it is not necessary to decide whether the rule against perpetuities is violated, but apparently decides that there is a gift to charity which is good, but which is taxable.

The only theory which is logical for taxing the entire estate in the hands of the trustees would be to hold the charity void, and a resulting trust in favor of the heir. But in that case the heir being a son, the entire estate would go to him and the statute

provides a tax of 3½ per cent. with an exemption of $5,000 or a tax of $11,103.37 instead of the present tax of $19,655.86.

If there is a good gift to charity the statute exempts it and the annuity to the son is the only taxable legacy, and that calls for a tax of $4,569.96.

There are then three results:

1st. A void trust to charity, a resulting trust in the heir and a tax of $11,103.37.

2d. A valid trust to charity, taxable, in which case there would be two taxes: one on the annuity of $4,569.96 and one on the remainder to charity of $7,750.10, making a total of $12,320.06.

3d. A valid trust to charity, exempt, with a tax upon the annuity of $4,569.96.

THE CASE OF *ESTATE OF DILLINGHAM,* 25 HAW. 129, DECIDED AFTER THE DECISION OF THIS CASE WHEN FIRST IN THE SUPREME COURT HOLDS THAT THE BENEFICIARIES PAY THE TAX ON LEGACIES.

Estate of Dillingham, 25 Haw. 129, decided seventeen days after the first decision in this case, the court in passing on the question whether the federal estate tax should be deducted from the gross estate before territorial inheritance taxes are imposed says, 'This then brings us to a consideration of the nature of the federal estate tax because upon that, we think, depends the answer to the question whether or not the amount by way of such tax ever in fact passes to the beneficiaries under the will who are called upon to pay to the Territory a tax upon the property thus passing to them." The court then decided the federal tax should be deducted. It holds

the federal tax is one on the "power to transmit or the transmission from the dead to the living and is not a tax upon the legacies to be measured by the value of such legacies." In other words, that the federal tax is one on the power of the testator to transmit, while the territorial tax is one on the legatees to receive.

This is exactly the contention of the appellants, that the tax in this case should be based upon the right to succeed and that the language, "passes to the *beneficiaries* under the will who are called upon to pay to the Territory a tax upon the property thus passing to them," describes exactly to appellant's contention.

THE COURT DID NOT PASS UPON THE QUESTION OF THE VALIDITY OF THE AMOUNT OF THE TAX WHICH WAS RAISED BY THE ASSIGNMENT OF ERROR.

The court says in its opinion that the only questions raised by the assignments of error in the Supreme Court were whether the annuity and the remainder were taxable. (Record, p. 61.)

This is not so, as the first assignment of error raises the question whether the tax of $19,655.86 was erroneous in the following form:

"1. That it was error to render and enter the decree in said cause directing the payment by the plaintiffs-in-error of a tax of $19,655.86 and interest thereon at 7% from October 8, 1918." (Record, p. 53.)

This raised the question of amount of the tax which was ignored in the decision of the Supreme Court.

There was nothing in the former decision which showed at what rate a tax should be levied. There

was merely a reserved question whether any appraisers should be appointed as no tax might be due.

THERE IS MANIFEST ERROR AND THE RULE OF CONSTRUCTION OF A LOCAL LAW SHOULD NOT BE APPLIED.

If this were a question of construction of a local law it would be binding on a federal court in exercising co-ordinate jurisdiction, but the rule in this court in exercising its appellate jurisdiction is different and it is not bound if there is manifest error.

In *Fox v. Haarstick,* 156 U. S. 674, "It is true that this ruling of the Supreme Court of the Territory does not, even in questions of practice arising under the local law, preclude this court from reviewing it as would a decision of a state court in similar circumstances; but unless a manifest error be disclosed, we should not feel disposed to disturb a decision of the supreme court of a territory construing a local statute."

There is a manifest error in the rate and amount of tax upon the legacies, especially as that question was denied consideration by the Supreme Court.

Moreover, aside from the size of the tax, which is erroneous, the decision is so obscure in view of the words of the court in the case of *Estate of Dillingham, supra,* as to leave it uncertain whether it was arrived at by construing the statute or by holding that the charity was invalid, which is a question of general rather than local law.

This court in this same estate has taken jurisdiction in the construction of a local law, to-wit, the law of dower and descent.

Castle v. Castle, 267 Fed. 521.

There is no question of well settled local law in this case, as this is the first decision under this statute which involves the points at issue. There has never been a decision either in Hawaii or anywhere else holding that the trustees were the successors under the statute and not the beneficiaries.

The case of *Estate of Brown,* 24 Haw. 443, which is said to be affirmed, was decided upon a tax which became due before the amendment quoted *supra* in 1917, wherein it is ordered that the tax on legacies should be paid, "out of the property transferred."

THE CASE OF *ESTATE OF BROWN,* 24 HAW. 443, IS CONTRA TO WELL-SETTLED LAW AND THE HAWAIIAN STATUTE HAS SINCE BEEN CHANGED.

The case of *Estate of Brown,* 24 Haw. 443, decides that an annuity is not property and no interest in property passes to a legatee of an annuity, but all the property on which it is charged passes to the remainderman. In this case as the residuary bequest is to trustees for charity, which the statute exempts, then both legacies are exempt from taxation; the annuity under the decision of *Estate of Brown* supra, if it applies, and the remainder under the statute. Of course, if the annuitant has no property in the remainder, then the remainderman takes it all, free from any property claim. But the court decides that two legacies which are exempt separately as to successions are taxable together.

In other words, that nothing and nothing added makes two. This is a *reductio ad absurdum.* The court did not see that the case of *Estate of Brown* supra was both wrong in principle and made innocuous by the statute of 1917.

Mr. Justice Holmes, in the case of *U. S. v. Fidelity Trust Co.,* 222 U. S. 158, punctures this theory of an annuity not being a vested interest in the fund. A legacy of an annuity was given a niece and there was an attempt to recover back a portion of the succession tax under the statute that exempted estates which had not vested prior to July 1, 1902, it being claimed that only that portion which had been paid the niece prior thereto had vested. The court says: "It was a vested interest in a fund * * * objections like those which are made to treating a life estate as a present unity might be made to the similar treatment of absolute ownership in fee. In actual life a fee can be enjoyed only minute by minute, but although eternal in theory of law, by the same theory at every moment it is all and wholly in the owner's hand. The statute does not invite speculation in a new nomenclature or attempt to reach profounder conceptions than those familiar to the law. * * * It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment."

Approved in *Kahn v. U. S.,* Advance Sheets U. S. Supreme Court, Jan. 1, 1922.

THE HAWAIIAN STATUTE EXPRESSLY EXEMPTS GIFTS TO TRUSTEES TO BE DEVOTED TO CHARITY.

There does not seem to be any necessity to more than quote the statute of exemption of gifts to trustees for an educational purpose to show that the trustees when so receiving gifts are not liable to a tax. On this issue there is no question as to who are the successors, the trustees or the beneficiaries, as the statute expressly exempts "property transferred * * * to any person * * * or association of persons * * * in trust for or to be devoted to any educational purpose." Nothing could be clearer that the gift in this will to charity is exempt from a succession tax unless the gift is void as violating the rule against perpetuities which the court has expressly held it did not pass upon.

The court by a strained construction of the word devoted in the statute and failing to take into consideration that it is but a part of a phrase "to be devoted" says that because Webster defines that word as meaning "to give up wholly" that therefore a gift to be devoted to charity which has a charge upon it of an annuity is not a giving up wholly and consequently is not exempt. The words of the statute are "for or to be devoted to any charitable, benevolent, educational or public purpose." It would seem that this plainly implies either a present or a future devotion of the gift, meaning that a gift to charity after an intervening life estate is exempt. Appar-

ently the court contends that the words "to be devoted" mean not the devoting of the entire fund to a charity at a future time, but that a testator must devote or give up wholly his entire estate to a charity in order to have it exempt, which on the face is absurd.

To quote Mr. Justice Holmes again in *U. S. v. Fidelity Trust Co.,* supra, "The statute does not invite speculations on a new nomenclature or to reach profounder conceptions than those familiar to the law. * * * It deals in terms with the interest, that is, *the legal unit of right.*"

The case of *Balch v. Shaw,* 174 Mass. 144, is one in which an inheritance law such as the Hawaiian statute was construed, wherein the donor gave a fund to charity, charged with an annunity, and the court held the charitable gift exempt. The Massachusetts statute was not as strong as the Hawaiian in that the exemption clause was "to or for charitable, educational or religious societies or institutions." The interpretation made by the Hawaiian court was evidently not thought worthy of consideration either by the Attorney General who sought to impose a tax or the court which passed on the question. The court held it was for an educational institution although charged with a life estate.

THE CHARITY IS GOOD.

There are two things that must be determined in any case involving the question of the validity of a public charity:

1st. Does it vest in the hands of trustees for the

charitable purpose within the time required by the rule against perpetuities?

2nd. Is there any one who has a private interest as a beneficiary beyond the time defined for the existence of a private trust by the rule against perpetuities?

There is a present vesting by the terms of the will in the hands of trustees for charity, as the gift is immediately to them.

The only beneficiaries under the will are the life estate of H. K. L. Castle, which of course does not violate the rule and the educational purpose. All the other provisions are mere directions as to investments, the profits or losses of which would be borne by the educational charity.

The only private purpose that could by any possibility be implied is where in the expansion of its business the testator provides "to accumulate sufficient land and capital to systematically establish an effort to introduce a high-class agricultural immigration of Northern races, preferably Scandinavian, Anglo-Saxon and Teutonic, then I desire them to expand into such enterprises without hesitation and I hereby empower them amply herein for the purpose." (Record, p. 9.) There is nothing here to show that any money is to be expended except as incidental to the management of the trust property, and in that expansion the charitable trust is the beneficiary, but even if this were to be construed as a power to use the funds for immigration purposes and assisting individuals of the Northern races to emigrate to Ha-

waii, that would have all the elements of a charitable purpose.

When we consider that Hawaii is the meeting ground of the Christian and Oriental civilizations; that the introduction of a Christian immigration is of vital consequence to the spread of Christianity; that it is for the benefit of an indefinite number of people and is not confined to individuals, there is found therein all the elements of Mr. Binney's famous definition:

> "Whatever is given for the love of God or for the love of your neighbor in the catholic or universal sense—given from those motives and to those ends, free from the stain or taint of every consideration that is personal, private or selfish."

Nothing has more of a religious object than the spreading of the Christian civilization. This is the motive and the end of this clause. The Oriental labor economically would be more profitable, but the fate of Hawaii as a Christian white colony might depend upon an immigration of Scandinavians, Anglo-Saxons and Teutons.

But it is not necessary to decide this question, as the language of the will indicates merely that the immigration shall be induced as the mere incident of the development and expansion in business of the trustees.

In *Burbank v. Whitney,* 24 Pick. 146, it was decided a gift to the American Colonization Society, whose purpose was the colonizing with their own

consent on the coast of Africa the people of color residing in America was held a good charity.

Moreover, there are English cases which hold that a general gift to the increase and encouragement of good servants is a good charity.

Loscombe v. Winteringham, 13 Beavan 87.
Reeve. v. Atty. Gen., 3 Haw. 991.
Miller v. Rowan, 5 Cl. 2 Fin. 99.

The question of vesting is settled by the case of *Lunalilo Trustees v. Haalilio,* 8 Haw. 640, in which there was a gift to three trustees to be nominated by the Supreme Court, who were to sell the real estate and hold till it accumulated amount to $25,000; then to purchase land and build home for destitute and infirm Hawaiians. Held no resulting trust in heirs. Here was the same gift to trustees for a charitable purpose and the holding the property for an accumulation.

In this case there is no such question as has been disturbing the New York courts for years, and which was finally remedied by statute in 1893, a gift to trustees to turn over to a corporation not in existence, but the trustees are themselves the managing and holding trustees for the charity.

Even in the New York exception the English and the great majority of American decisions are that there is a present vesting.

Gray on Perpetuities, Sec. 607.
Inglis v. Sailors Snug Harbor, 3 Pet. 99.
Ould v. Washington Hospital, 95 U. S. 303.

Russell v. Allen, 107 U. S. 163.
Codman v. Brigham, 187 Mass. 309.

This last will was construed by the federal court in *Brigham v. Hospital,* 134 Fed. 513. The leading English case is *Chamberlayne v. Brockett,* 5 L. R., Ch. 206.

POWERS MAY BE VOID, BUT THEREBY DO NOT INVALIDATE THE CHARITY IF THERE IS A PRESENT VESTING FOR CHARITY.

The only reason there is any semblance of doubt as to the validity of this charitable trust is because the testator has given his trustees powers of business management which are not within the ordinary powers of trustees in the investment of charitable funds.

But void powers of management do not in any way invalidate a charity otherwise good.

Odell v. Odell, 10 Allen 1: "The reasons are much stronger for not allowing illegal directions for accumulations or management of a fund devoted to charitable purposes, to defeat the gift, and for carrying out the scheme of the testator as far as the law will allow, if it cannot be followed to its full extent," and cases cited.

Perry on Trusts, Sec. 738.

The testator provides that all excess income shall accumulate during the life estate for the educational purpose. The charity is the beneficiary of all surplus income. Because it is invested in certain com-

mercial enterprises evidently dear to the heart of the testator does not in any way impair the character of the charitable gift.

A testator might give his entire estate to trustees for charity and provide that they might use the capital to speculate on margin in the stock market. The gift to charity would be good, the power would be void and its exercise restrained by a court of equity.

Nourse v. Merriam, 8 Cush. 11, where a gift was made for education in a certain town and eight persons, named, and their descendants were excluded from the benefits of gift. The charity was held good and the direction or limitation void as against public policy.

Russell v. Allen, 107 U. S. 163, says:

"The testator's directions as to management of the income must be regarded as subsidiary to the general objects of his will, and whether legal and practicable or otherwise, can exert no influence over its validity."

Tincher v. Arnold, 147 Fed. 665, 7 L. R. A. (N. S.) 476:

"Assuming that the whole scheme of management should fail the charitable use will not be permitted to fail. *In re Daly's Estate,* 206 Pa. 58."

Perry on Trusts, Sec. 738:

"But if an estate given to trustees for charity is once vested in them for a lawful purpose, all unlawful conditions, limitations, powers, trusts, or restraints annexed thereto, as directions for the man-

agement of the fund, and not of the essence of the gift, will fall away and be simply void, leaving the estate still vested in the trustees to be managed in a legal manner for the purposes of the charity."

Philadelphia v. Girard, 45 Pa. St. 1:

"In all gifts for charitable uses the law makes a very clear distinction between these parts of the writing conveying them, which declares the gift and its purposes, and those which direct the mode of its administration."

Gray on Perpetuities, Sec. 505, says that the question of whether a gift is void because it violates the rule against perpetuities is to be determined by whether the charity begins and not how it ends.

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